

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	
)	Bankruptcy Case
Rebecca J. Dawson,)	No. 11-39917-rld13
)	
Debtor.)	
_____)	
)	
Shamrock Building Materials, Inc.,)	Adv. Proc. No. 12-03042-rld
)	
Plaintiff,)	
)	
v.)	MEMORANDUM DECISION
)	(Dismissing First and Second
Rebecca J. Dawson,)	Claims for Relief; Denying
)	Leave to Amend Complaint)
Defendant.)	
_____)	

Defendant Rebecca J. Dawson filed a chapter 13¹ petition on November 18, 2011. In her Schedule F, Ms. Dawson scheduled the unsecured claim of Plaintiff, Shamrock Building Materials, Inc. ("Shamrock"), based

¹ Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 upon a state court judgment ("Judgment"), in the amount of \$12,583.64.
2 Shamrock timely commenced an adversary proceeding against both Ms. Dawson
3 and Rebel Country Lumber, LLC ("RCL"), the limited liability company of
4 which Ms. Dawson was the sole member and manager, seeking a determination
5 that the Judgment was nondischargeable.

6 The underlying facts as stated in the adversary complaint
7 ("Complaint"), are that Ms. Dawson signed a credit agreement ("Credit
8 Agreement") with Shamrock, pursuant to which Shamrock extended credit to
9 Ms. Dawson and RCL by selling them goods on credit. Ms. Dawson
10 purportedly thereafter transferred ownership of RCL to her son, Stephen
11 G. Parker, by means of a gift. Shamrock asserts that while Ms. Dawson
12 held herself out to be the sole member and manager of RCL, she did not
13 participate in the management of RCL. Instead, Ms. Dawson and RCL acted
14 as a "front" for Ms. Dawson's son, Stephen G. Parker, to induce Shamrock
15 to extend credit for use by Mr. Parker, even though Shamrock previously
16 had refused to extend credit.

17 Shamrock included three claims for relief in its Complaint.

18 The First Claim for Relief asserts that Ms. Dawson, as the sole
19 member and manager of RCL, owed a duty to RCL's creditors, including
20 Shamrock, to exercise reasonable skill, care, and caution in the
21 management and operation of RCL, and that Ms. Dawson's negligent breach
22 of that duty, as articulated in the Complaint, constituted a defalcation
23 while acting in a fiduciary capacity as contemplated by § 523(a)(4).

24 The Second Claim for Relief asserts that Ms. Dawson, as the
25 sole member and manager of RCL, owed a fiduciary duty to RCL's creditors,
26

1 including Shamrock, and that Ms. Dawson's breach of that fiduciary duty,
2 as articulated in the Complaint, constituted a defalcation while acting
3 in a fiduciary capacity as contemplated by § 523(a)(4).

4 The Third Claim for Relief asserts that Ms. Dawson obtained
5 credit from Shamrock on false pretenses, such that Shamrock's claim is
6 nondischargeable pursuant to § 523(a)(2)(A).

7 Pursuant to Civil Rule 16(c)(2)(A), applicable in this
8 adversary proceeding pursuant to Rule 7016, at any pretrial conference I
9 am authorized to formulate and simplify issues and to eliminate frivolous
10 claims or defenses. To that end, at the initial pretrial conference held
11 April 10, 2012 ("Initial Pretrial Conference"), I dismissed the Complaint
12 as to RCL on the bases that (1) no § 523(a) claim for relief could be
13 stated against RCL in Ms. Dawson's bankruptcy case, and (2) even were RCL
14 to file its own chapter 7 bankruptcy case, as a limited liability
15 company, it would not be entitled to a discharge of its debts under the
16 Bankruptcy Code. My order dismissing RCL as a defendant in this
17 adversary proceeding was entered April 13, 2012. See Docket #9.

18 At the Initial Pretrial Conference, I also informed Shamrock,
19 through its counsel, that the law in the Ninth Circuit is settled with
20 respect to the requirement that an express or technical trust must be in
21 existence to support a § 523(a)(4) claim for relief based upon the
22 alleged fraud or defalcation of a purported fiduciary. I further
23 informed Shamrock that, on its face, the Complaint did not state facts
24 sufficient to establish a claim that Ms. Dawson had a fiduciary duty to
25 Shamrock as a result of Ms. Dawson's execution of the Credit Agreement.

1 I set a deadline for Shamrock to provide authority to support its claims
2 that Shamrock and Ms. Dawson were in a fiduciary relationship. Finally,
3 I advised Shamrock that in the absence of such authority, I intended to
4 dismiss the First Claim for Relief and the Second Claim for Relief, both
5 of which depend upon the existence of a fiduciary relationship.

6 I set May 11, 2012 as the deadline for Shamrock to file a
7 memorandum of authority to pursue its § 523(a)(4) claims for relief
8 against Ms. Dawson. Shamrock timely filed its memorandum ("Shamrock
9 Memorandum"). See Docket #21.

10 I have reviewed the Complaint, the Shamrock Memorandum, and the
11 law relevant to pleading breach of a fiduciary relationship in the Ninth
12 Circuit, and I conclude that the First Claim for Relief and the Second
13 Claim for Relief should be dismissed for failure to state a claim upon
14 which relief can be granted. My reasons follow.

15 Civil Rule 8(a), applicable in bankruptcy adversary proceedings
16 pursuant to Rule 7008, sets the requirement for stating a claim for
17 relief in a complaint:

18 A pleading that states a claim for relief must contain:

19 (1) a short and plain statement of the grounds for the
20 court's jurisdiction, unless the court already has
21 jurisdiction and the claim needs no new jurisdictional
22 support;

22 (2) a short and plain statement of the claim showing that
the pleader is entitled to relief; and

23 (3) a demand for the relief sought, which may include relief
24 in the alternative or different types of relief.

25 / / /

1 The Ninth Circuit Bankruptcy Appellate Panel ("BAP") recently
2 set forth both the parameters for pleading a claim for relief under Rule
3 7008 and for my dismissal of a claim for relief that does not comply with
4 Rule 7008.

5 Factual allegations in a complaint "must be enough to raise
6 a right to relief above the speculative level," Bell Atl.
7 Corp. v. Twombly, 550 U.S.[544, 555 (2007)], and must be
8 adequate to "state a claim to relief that is plausible on
9 its face." Ashcroft v. Iqbal, [556 U.S. 662, 678 (2009)].
However, dismissal on the pleadings is appropriate only if
the complaint fails to plead facts sufficient "to raise a
reasonable expectation that discovery will reveal evidence"
supporting relief. Bell Atl. Corp. v. Twombly, 550 U.S. at
556[.]

10
11 Charlie Y., Inc. v. Carey (In re Carey), 446 B.R 384, 392 ((9th Cir. BAP
12 2011)).

13 For Shamrock's Judgment to be nondischargeable under
14 § 523(a)(4), I must find "1) an express trust existed, 2) the debt was
15 caused by fraud or defalcation, and 3) the debtor acted as a fiduciary to
16 the creditor at the time the debt was created." Otto v. Niles (In re
17 Niles), 106 F.3d 1456, 1459 (9th Cir. 1997) (internal quotation marks
18 omitted; emphasis added). The facts as alleged in the Complaint do not
19 support at least two of the elements identified in Niles.

20 The Complaint Does Not Plead Facts to Support a Finding That
21 an Express Trust Exists.

22 The complaint does not state facts sufficient to establish the
23 existence of an express trust, a necessary element of a claim for relief
24 under § 523(a)(4). The Shamrock Memorandum simply acknowledges that an
25 express trust must exist in order to prevail on a claim for relief for
26

1 defalcation of a fiduciary duty. Without law or additional facts to
2 support its conclusion, Shamrock merely states that the Credit Agreement
3 constituted an express trust. It does not. I look to Oregon law, which
4 Shamrock did not, to establish what constitutes an express trust.

5 An express trust is created when a grantor or trustor
6 divests herself or himself of full legal and equitable
7 ownership in property with a manifestation of intent to
create legal title in a trustee and equitable ownership in a
beneficiary.

8 Brown v. Brown, 206 Or. App. 239, 249, 136 P.3d 745, rev. den., 341 Or.
9 449, 143 P.3d 772 (2006).

10 The Complaint contains no allegation that at the time she
11 signed the Credit Agreement, Ms. Dawson divested herself of full legal
12 and equitable ownership of RCL and its assets with a manifestation of
13 intent to create legal title in herself as trustee and equitable
14 ownership in Shamrock as a beneficiary. Ms. Dawson simply committed to
15 be obligated to repay any credit Shamrock might extend to RCL under the
16 Credit Agreement. Thus the Credit Agreement did not create an express
17 trust.

18 Ms. Dawson Did Not Act as Shamrock's Fiduciary

19 "Fiduciary capacity" is defined and governed by federal law,
20 which narrowly restricts the term to fiduciary relationships
21 that arise from express or technical trusts. Lee-Benner v.
Gergely (In re Gergely), 110 F.3d 1448, 1450 (9th
22 Cir.1997)(quoting Ragsdale v. Haller, 780 F.2d 794, 796 (9th
23 Cir.1986)); Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185
24 (9th Cir.1996). The broad general definition of a fiduciary
relationship, i.e., a relationship of confidence, trust or
good faith, is not relevant in the dischargeability context.
Ragsdale, 780 F.2d at 796.

25 / / /

1 T&D Moravits & Co. v. Munton (In re Munton), 352 B.R. 707, 712-13 (9th
2 Cir. BAP 2006).

3 Though the definition of "fiduciary capacity" is guided by
4 federal law, we look to state law to determine whether the
5 requisite trust relationship exists. Ragsdale, 780 F.2d at
6 796. A debtor will be deemed a fiduciary if state law
7 creates an express or technical trust relationship which
8 imposes trustee status upon the debtor. Id.

9 Munton, 352 B.R. at 713.

10 As previously discussed, the Credit Agreement did not create an
11 express trust under Oregon law. Without the existence of an express
12 trust, Ms. Dawson will not be deemed a fiduciary to Shamrock with respect
13 to the Credit Agreement under federal bankruptcy law. She therefore
14 could not have been acting as Shamrock's fiduciary for purposes of
15 § 523(a)(4) when the debt to Shamrock was created, i.e., when Shamrock
16 extended credit under the Credit Agreement.

17 Because the factual allegations in the Complaint do not meet
18 the elements set forth in Niles to establish that Shamrock is entitled to
19 relief under § 523(a)(4), they are not "adequate to state a claim to
20 relief that is plausible on its face." Charlie Y., Inc. v. Carey (In re
21 Carey), 446 B.R. at 392, citing Ashcroft v. Iqbal, 556 U.S. at 678.
22 Further, the Complaint fails to plead facts sufficient to raise a
23 reasonable expectation that discovery will reveal evidence to establish
24 the existence of an express trust. Bell Atl. Corp. v. Twombly, 550 U.S.
25 at 556. Under these circumstances, dismissal of Shamrock's First Claim
26 for Relief and Second Claim for Relief is appropriate.

/ / /

1 The Complaint Does Not Allege Facts Sufficient To Support a
2 Claim for Relief for Embezzlement.

3 Shamrock did not assert a claim for embezzlement in its
4 Complaint, nor has it filed, pursuant to Civil Rule 15, applicable in
5 this adversary proceeding under Rule 7015, a motion for leave to amend
6 the Complaint to include an embezzlement claim. Instead, in the Shamrock
7 Memorandum, Shamrock argues that I should not dismiss the claims actually
8 pled under § 523(a)(4), defalcation while acting in a fiduciary capacity,
9 because the facts alleged support a claim for embezzlement under
10 § 523(a)(4).² For the sake of efficiency, I construe the Shamrock
11 Memorandum as Shamrock's motion for leave to amend the Complaint to
12 allege a claim for relief for embezzlement, and I deny that motion.

13 Shamrock correctly states that a claim for embezzlement under
14 § 523(a)(4) does not require the existence of a fiduciary relationship.

15 Under federal law, embezzlement in the context of
16 nondischargeability has often been defined as "the fraudulent
17 appropriation of property by a person to whom such property
18 has been entrusted or into whose hands it has lawfully come." Moore v. United States, 160 U.S. 268, 269 (1885).
19 Embezzlement, thus, requires three elements: "(1) property
20 rightfully in the possession of a nonowner; (2) nonowner's
21 appropriation of the property to a use other than which [it]
22 was entrusted; and (3) circumstances indicating fraud." In
23 re Hoffman, 70 B.R. 155, 162 (Bankr. W.D. Ark. 1986); In re
24 Schultz, 46 B.R. 880, 889 (Bankr. D. Nev. 1985).

25 / / /

26 ² Section 523(a)(4) provides -

27 A discharge under section 727 . . . or 1328(b) of this title does
28 not discharge an individual debtor from any debt -
29 (4) for fraud or defalcation while acting in a fiduciary
30 capacity, embezzlement, or larceny[.]

1 Transamerica Comm'l Finance Corp. v. Littleton (In re Littleton), 942
2 F.2d 551, 555 (9th Cir. 1991).

3 The underlying facts about the Credit Agreement as stated in
4 the Complaint are: the Credit Agreement was signed on January 25, 2011
5 (§ 6); the Credit Agreement extended credit from Shamrock to Ms. Dawson
6 and RCL (§ 7); the Credit Agreement fixed interest on an amount past due
7 at 18% per annum (§ 8); and pursuant to the Credit Agreement, Shamrock
8 sold goods to Ms. Dawson and RCL on credit. (§ 9). Shamrock now asserts,
9 as a legal conclusion, that by signing the Credit Agreement, Ms. Dawson
10 gave Shamrock a property interest in RCL and its assets. Shamrock
11 provides no authority to support this interpretation of an agreement to
12 extend credit, and I am unaware of any authority to support such a
13 conclusion. Any transfer of RCL and its assets by Ms. Dawson therefore
14 could not have been the act of a "non-owner" appropriating property to a
15 use other than that for which it was entrusted.

16 Accordingly, there are no facts in the Complaint to support a
17 claim for relief for embezzlement. Nor do I have a reasonable
18 expectation that discovery would lead to evidence to support a claim for
19 embezzlement.

20 I have discretion in deciding whether to grant leave to amend a
21 complaint. That discretion, however, is not exercised in a vacuum, but
22 rather I must be mindful of the admonition that I should "freely give
23 leave when justice so requires." Civil Rule 15(a)(2) (emphasis added).
24 Here, I find that it would be a futile exercise to allow Shamrock to
25 amend the Complaint, because the underlying facts or circumstances relied
26

1 upon by Shamrock are not a proper subject for an embezzlement claim for
2 relief. See Foman v. Davis, 371 U.S. 178, 182 (1962); Chudacoff v. Univ.
3 Med. Ctr. of S. Nev., 649 F.3d 1143, 1152 (9th Cir. 2011).

4 Conclusion

5 For the foregoing reasons, I will (1) dismiss the First Claim
6 for Relief and the Second Claim for Relief, and (2) deny Shamrock's
7 motion for leave to amend the Complaint to assert a claim for
8 embezzlement. I will enter appropriate orders based upon my findings in
9 this memorandum.

10 Trial in this adversary will proceed only on Shamrock's
11 existing Third Claim for Relief based upon § 523(a)(2).

12 ###
13

14 cc: Abraham J. Barnett, Esq.
15 Ted A. Troutman, Esq.
16
17
18
19
20
21
22
23
24
25
26